

BR

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 56173 s43D BY S. KENNETH AND)
ANN V. SHESNE)

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision in this matter has expired. No exceptions were received from any party of record. The Department accepts and adopts the Findings of Fact and Conclusions of Law as set forth in the October 20, 1986 Proposal for Decision, and incorporates them herein by reference. Based upon these Findings of Fact and Conclusions of Law, and all files and records herein, the Department makes the following:


ORDER

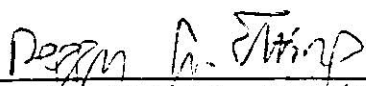
Application for Beneficial Water Use Permit No. 56713-s43D by S. Kenneth and Ann V. Shesne hereby is denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 21 day of November 1986.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605


Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

CASE # 56173

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on November 21, 1986, she deposited in the United States mail first class postage prepaid, a Final Order by the Department on the Application by S. Kenneth and Ann V. Shesne, Application No. 56173-s43D, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. S. Kenneth & Ann V. Shesne, Rt 2, Box 3455, Red Lodge, MT 59068
2. Rocky Fork Decreed Users, Inc., c/o Gladys Zumbrun, Secretary, Rt. 2, Box 3260, Red Lodge, MT 59068
3. Haara Ditch Co., c/o Lloyd Zumbrun, Rt. 2, Box 3260, Red Lodge, MT 59068
4. Pryde Ditch Co., c/o Edwin L. Draper, Rt. 2, Box 3040, Red Lodge, MT 59068
5. Keith Kerbel, Manager, Water Rights Bureau Field Office, Billings, MT (inter-departmental mail)
6. Gary Fritz, Administrator, Water Resources Division (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 21st day of November, 1986, before me, a Notary Public in and for said state, personally appeared, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 12-1-1987

CASE # 56173

BB.

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 56173-s43D BY S. KENNETH AND)
ANN V. SHESNE)

* * * * *

Pursuant to the Montana Water Use Act (MCA Title 85, Chapter 2) and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on October 28, 1985 in Red Lodge, Montana.

S. Kenneth and Ann V. Shesne, the Applicants in this matter, appeared by and through S. Kenneth Shesne.

Objector Rocky Fork Decreed Users Inc. appeared by and through Gladys Zumbrun, Secretary of the association, and Toivo Lantta, Director of the association.

Oliver Wilson and Michael Draper, water users of Rocky Creek decreed water, appeared at the hearing but did not participate.

Objector Haara Ditch Company appeared by and through Lloyd L. Zumbrun, Chairman, and Art Luoma.

Objector Pryde Ditch Company appeared by and through Edwin L. Draper.

Keith Kerbel, Field Manager of the Billings Water Rights Bureau Field Office, appeared as staff expert witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

CASE # 56173

STATEMENT OF THE CASE

On August 13, 1984, the Applicants filed Application for Beneficial Water Use Permit 56173-s43D, requesting .55 cubic feet per second ("cfs") up to 5 acre-feet of water per year from the West Fork of Rock Creek for irrigation of .647 acres of land, to maintain the cottonwood trees on Applicants' property and to provide "esthetic and wildlife value."

The Application describes the diversion as follows: "Water is diverted from West Fork of Rock Creek to irrigation ditch then further diverted by a branch ditch which then passes as a narrow stream thru the valley and thru our property & eventually, into Rock Creek." The point of diversion listed on the Application and in the Public Notice in this matter is the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 5, Township 08 South, Range 20 East, in Carbon County, Montana. This is (approximately) the point at which the irrigation ditch referred to by the Application diverts water from the West Fork of Rock Creek. (See Finding of Fact 15.)

The means of diversion is listed on the Application and in the Public Notice as a headgate with ditch or pipeline. As clarified at the hearing in this matter, the headgate and ditch refer to the Pryde Ditch and its diversion from Rock Creek, and not to the Applicants' means of diversion. The Application lists the method of irrigation as "natural stream seepage", to be used from June 15 through September 15 of each year.

The pertinent portions of the Application were published in the Carbon County News, a newspaper of general circulation in the area of the source, on September 27 and October 4, 1984.

CASE # 56173

Three timely objections were filed to the Application.

The Pryde Ditch Company objected to the Application, alleging that the proposed appropriation would have an adverse affect on prior decreed rights downstream, since "West Fork & Rock Creek are over appropriated" and "dam water" must be purchased to supplement the flow of West Fork in order to fill prior decreed rights.

The Haara Ditch Company objected to the Applications, based on the same allegations as those made by the Pryde Ditch Company, and alleging adverse affect to the City of Red Lodge. The Objection states that decreed rights on the source are sometimes shut down in low flow in order that the City may receive water.

Rocky Fork Decreed Users Inc. objected to the Application based on the same allegations set forth by the Pryde Ditch Company and Haara Ditch Company objections.

Prior to the hearing in this matter, Keith Kerbel mailed a document entitled "Hearings Report on Application For a Provisional Water Use Permit No. 56173-s43D by Kenneth and Ann Shesne" to all parties of record. See Department Exhibit 1.

The hearing in this matter was completed on October 28, 1985, and the record was closed at the end of the hearing.

EXHIBITS

The Applicants did not submit any exhibits for inclusion in the record in this matter.

The Objectors offered two exhibits for inclusion in the record in this matter:

Objectors' Exhibit 1 is a record of Water Commissioner activity on Rock Creek from 1960 through 1985.

Objectors' Exhibit 2 is a photocopy of the Complaint filed by the City of Red Lodge in Granite Ditch Co. v. Anderson (In the District Court of the Thirteenth Judicial District of the State of Montana, In and For the County of Carbon, Cause No. 275), with a cover Order by the District Court; dated May 20, 1985.

Objectors' Exhibits 1 and 2 were accepted for the record without objection.

The Department offered eleven exhibits for inclusion in the record in this matter:

Department Exhibit 1 is a copy of a report entitled "Hearings Report on Application for a Provisional Water Use Permit No. 56173-s43D by Kenneth and Ann Shesne", prepared by Keith Kerbel of the Billings Water Rights Bureau Field Office.

Department Exhibit 2 is a photocopy of a letter to S. Kenneth and Ann V. Shesne, dated December 12, 1984, from Keith Kerbel. The letter proposes that a Beneficial Water Use Permit be issued to the Applicants based on certain specified permit conditions.

Department Exhibit 3 is a photocopy of the 1903 Decree on Rock Creek. (Granite Ditch Co. v. Anderson, In the District Court of the Sixth Judicial District of the State of Montana, In and For the County of Carbon, Cause No. 275.)

Department Exhibit 4 is a photocopy of Statements of Claim of Existing Water Rights Nos. 10233 and 10234, filed by the Haara Ditch Company.

CASE #56173

Department Exhibit 5 is a photocopy of Statements of Claim of Existing Water Rights (Nos. 529361 through 529366) filed by the Draper Ranch Company on water from the Pryde Ditch.

Department Exhibit 6 is a photocopy of a "petition" to the Department of Natural Resources and Conservation to Adopt Rules to Reject Permit Applications, or Modify or Condition Permits Issued in a Highly Appropriated Water Basin or Subbasin", identifying Rock Creek drainage and all tributaries as the area to which the petition applies.

Department Exhibit 7 is a photocopy of two pages from the Carbon County Water Resources Survey (June, 1966; pages 21 and 22) which discuss the times and locations of U.S.G.S. stream gauging on Rock Creek.

Department Exhibit 8 is a photocopy of pages 62 and 63 from the Carbon County Water Resources Survey (June, 1966), which discuss the history of the Pryde Ditch Company.

Department Exhibit 9 is a photocopy of pages 50 and 51 from the Carbon County Water Resources Survey (June, 1966), which discuss the history of the Haara Ditch Company.

Department Exhibit 10 is a photocopy of pages 3-11 and 3-12 from the Montana Irrigation Guide (1973), showing crop requirements for crops in Climatic Area IV, which covers the area of the proposed use.

Department Exhibit 11 is a photocopy of a composite map taken from U.S.G.S. aerial photographs. The map shows a portion of the West Fork of Rock Creek, and has been labelled by Keith Kerbel with the approximate locations of the Pryde and Haara Ditches,

the Applicants' property, and the ditch turnout which spills water down past the Applicants' property. (See Finding of Fact 5.)

Department Exhibits 1 through 11 were accepted for the record without objection.

The Hearing Examiner, having reviewed the record in this matter and being fully advised of the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. Application for Beneficial Water Use Permit No. 56173-s43D was duly filed with the Department of Natural Resources and Conservation on August 13, 1984 at 3:49 p.m.

3. The pertinent portions of the Application were published in the Carbon County News, a newspaper of general circulation in the area of the source, on September 27 and October 4, 1984.

4. The source of the proposed appropriation is the West Fork of Rock Creek (also known as Rocky Fork), a surface water source located in Carbon County, Montana.

5. An irrigation conveyance ditch known as the Pryde Ditch diverts water from the West Fork of Rock Creek at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 5, Township 08 South, Range 20 East. (See Finding of Fact 15.) The ditch contains a turnout (overflow gate) located uphill from the Applicants, which is intended to handle overflow situations and prevent the ditch from being topped. (Testimony of Edwin Draper.) Water leaks, and occasionally is spilled, from the ditch at this point, and runs down a "wash" or coulee which goes past the Applicants' property. (Testimony of Kenneth Shesne, Keith Kerbel, Edwin Draper. See Department Exhibit 1.) The water eventually returns to Rock Creek. (Testimony of Lloyd Zumbrun, Toivo Lantta; Department Exhibit 1, page 2.)

6. Kenneth Shesne (hereafter, "the Applicant") testified that the water which runs past his property irrigates cottonwood trees on the land, as well as providing an aesthetic setting for his home, and adding value to the wildlife habitat. He is requesting a permit for the water in order to maintain the status quo; that is, to maintain the presence of water in the wash at such times as it has normally flowed. The Applicant testified that flow usually occurs during the irrigation season when the Pryde Ditch is conveying water. He stated that he listed September 15 as the cutoff date on his period of appropriation because he was told that the Pryde Ditch usually is shut off at or near this time of the year.

7. Mr. Shesne testified that he depends upon the cottonwoods located on his property for his firewood and kindling. He testified that he believes the cottonwoods would die without the flow which comes down the wash, based on the fact that the surrounding lands are a "sagebrush community" while cottonwoods grow only in the vicinity of the water.

Mr. Shesne characterized the cottonwood trees as a crop. When questioned as to whether he intends to plant trees to maintain the yield, he stated that the trees have reseeded themselves. He testified that he does not know how much water the trees require, but that the trees need water in the stream.

8. The Applicant testified that he does not intend to install any type of diversion or irrigation system, but rather means to rely on the present subirrigation. He testified that he means to leave the stream in its present condition, without alteration. He stated that the reason for applying for a Beneficial Water Use Permit for the "passive" use of water is to ensure that no one will be able to develop a consumptive use between the Pryde Ditch and the Applicants' property. He testified that other people have purchased property above him on the wash (referred to at the hearing as the Wapiti Valley), and that he is concerned that the upstream owners will divert the water for consumptive purposes and thus eliminate the flow past the Shesne property.

9. Mr. Shesne testified that the flow amounts for which he has applied was based on his estimate of the amount of flow in the stream, arrived at by calculations based on cross-sections of

the stream and measurements of the streamflow speed. He stated that the volume amount listed on the Application was suggested to him by Field Office personnel, based on the requested flow rate and period of appropriation.

Mr. Shesne testified that he does not need the whole flow of the stream, but just enough to properly irrigate the cottonwoods: he stated that he is willing to accept a permit for half the flow rate.

10. Mr. Shesne testified that he does not intend to claim water out of the Pryde Ditch, and that he understands that the flow may be eliminated at any time by repair work, relocation, or other action by the Pryde Ditch Company. He testified that he agrees to the permit conditions proposed by the Field Office (see Department Exhibit 2), which specify that he is not entitled to have the flow continue. Mr. Shesne stated that he only wants to ensure that the flow down the wash, if and when it occurs, makes it to his property so that the cottonwoods will receive water. He agreed that he is willing to accept a permit condition which would forbid him to impound, pump, or otherwise alter the natural flow of the stream.

11. Edwin Draper, appearing on behalf of the Objector Pryde Ditch Company and personally as a user of Pryde Ditch water, testified that he objected to the Application because there is not enough water available in the drainage for an additional use. He stated that an additional concern was that the Applicants intended on putting a headgate in the Pryde Ditch, and making their diversion from the Ditch, since the Public Notice was not clear on the place or means of diversion.

Mr. Draper testified that he believes the Applicants would get plenty of water, even if the Pryde Ditch leakage and spillage were eliminated, due to the high water table during the irrigation season. He stated that the coulee is a natural waterway that will have water (as long as irrigation occurs) sufficient to keep the cottonwood trees alive: he testified that no cottonwoods grew in the area before it was irrigated, even along the coulee.

12. Lloyd Zumbrun, appearing for the Objector Haara Ditch Company, testified that Haara Ditch Company objected to the Application because the Haara users were worried about the Applicants taking water out of the West Fork. He stated that he "guesses it's up to the Pryde Ditch," since the water for which the Applicants are applying is coming from the Pryde Ditch.

Mr. Zumbrun testified that Haara Ditch Company's other concern was that the Applicants' proposed use would reduce the amount of recharge to the creek, but that this probably won't be a problem if the Applicants are going to maintain the present situation of letting the water run back to Rock Creek, and doesn't install a dam, pump, or other diversion.

13. Art Luoma, appearing for the Objector Haara Ditch Company, testified that he is not concerned with the Applicants' proposed use as long as the Applicants leave things the way they currently exist, but that he is concerned that any successors to the Applicants may make consumptive uses pursuant to any permit issued in this matter. Mr. Luoma stated that it is important that the water running down the coulee is allowed to return to

Rock Creek, since it satisfies part of the downstream water needs and thereby the upstream water users do not have to allow as much water past their points of diversion.

14. Gladys Zumbrun and Toivo Lantta, appearing for the Objector Rocky Fork Decreed Users, testified that their concern with the Application is the difficulty of policing water use permits.

Mr. Lantta stated that permit users are often next to the creek, and can put a pump into the creek to divert for a short time or to divert after the water commissioner has finished checking. He stated that there are "hundreds" of such permits in the area, and though each one only takes a little bit of water, the cumulative effect makes a tremendous difference in the stream below.

Mrs. Zumbrun testified that such permit users say they are not using any water, or they are not making any use which can be determined by the water commissioner, and therefore permit users aren't regulated and don't have to help pay the costs of the water commissioner. Mrs. Zumbrun stated that the same policing problems may occur if the Applicants change their use to an actual diversion and consumptive use, or if they sell to someone who may change the use.

Mr. Lantta and Mrs. Zumbrun both stated that they would object to any uses requested by people above the Applicants, as well as to the Applicants' use, since the upstream users on Rock Creek depend upon the runoff from Pryde Ditch to help the creek recharge and fill the water needs of downstream water users.

15. Keith Kerbel, Field Manager of the Billings Water Rights Bureau Field Office, reiterated that the headgate and ditch which are listed on the Application and Public Notice refer to Pryde Ditch and its headgate on the West Fork of Rock Creek, and that the point of diversion which is listed for the Application is the point at which the Pryde Ditch diverts from the creek, rather than the point where water flows into the coulee from which the Applicants propose to divert. See Finding of Fact 5.

Mr. Kerbel testified that the legal descriptions and the means of diversion were so listed in order to clarify that the source of the water is the West Fork of Rock Creek, even though it goes through an intervening conveyancing system (Pryde Ditch) and a coulee, before it reaches the point where the Applicants intend for it to leave the stream for subirrigation. Since the water is West Fork water, it is the water users from Rock Creek who most likely could be adversely affected; therefore, public notice was given listing the West Fork of Rock Creek as the source, so that the appropriate water users might respond.

Mr. Kerbel testified that the legal description of the point of diversion for the Pryde Ditch recently has been verified to be slightly different from the previously used legal which was included in the Public Notice in this matter: Mr. Kerbel identified the correct legal point of diversion as the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 5, Township 08 South, Range 20 East, Carbon County, Montana, rather than the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5.

16. Mr. Kerbel stated that he agrees that permit water uses on Rock Creek are very hard to monitor and enforce, since many permit holders are "weekend water users" from Billings and elsewhere, and may be using the water at times when the Water Commissioner is not present.

17. Keith Kerbel testified that the Applicant's flow measurements of the water in the coulee probably are inaccurate due to the methods which the Applicant used: Mr. Kerbel stated that the Applicant's estimate of the flow is probably high, but that is impossible to tell without actual flow measurements with the proper equipment. (See Department Exhibit 1, page 2, for gaging information on the West Fork of Rock Creek.)

Mr. Kerbel also testified that whoever helped the Applicant fill out the Application apparently based the volume on the flow rate over the requested period of appropriation. Mr. Kerbel stated that he re-evaluated the volume based on Soil Conservation Service standards for orchards. Department Exhibit 10 indicates that the net irrigation requirement for orchards in the climatic area is 16.35 inches (1.36 acre-feet) per season.

Assuming an efficiency of 40 percent, and an irrigation area of .647 acres, the Applicants' total water requirement is 2.20 acre-feet per year. (See Department Exhibit 1, page 2.) At a constant flow rate over the Applicants' period of diversion, it would require approximately 5.5 gpm to fill the volume water requirement.

However, Mr. Kerbel did not supply any information which suggests that water use in an orchard is comparable to phreatophytes such as cottonwoods, which are highly water-consumptive.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicants prove by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply:

- (i) at times when the water can be put to the use proposed by the applicant,
- (ii) in the amount the applicant seeks to appropriate; and
- (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;

(b) the water rights of a prior appropriator will not be adversely affected;

- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The record in this matter contains substantial credible evidence that the water which the Applicants seek to appropriate is unappropriated water.

Testimony by the Objectors suggests that the West Fork of Rock Creek, and Rock Creek, are fully appropriated and often are even water-short. (See Findings of Fact 11, 13, and 14.) However, the record in this matter contains substantial credible evidence that the water which the Applicants seek to appropriate is waste and seepage water from the Pryde Ditch, and is not an additional demand on the West Fork of Rock Creek.

Although some of the water which is spilled by Pryde Ditch returns to Rock Creek and may be characterized as return flow (see Findings of Fact 13 and 14), the water for which the Applicants have applied is lost to Rock Creek, since it is absorbed by vegetation (including the Applicants' cottonwoods) along the way, and therefore is beyond the Objectors' control. See Perkins v. Kramer, 148 Mont. 355, 423, P.2d 587 (1966); Rock Creek Ditch and Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074 (1933).

The water is available during the period of appropriation which the Applicants have requested. See Finding of Fact 6. It is not possible to determine whether the amount requested is always available (see Findings of Fact 9 and 17); however, the record indicates that sufficient water currently is available to sustain the Applicants' "crop" of cottonwood trees. See Findings of Fact 7 and 11.

5. The water rights of prior appropriators will not be adversely affected.

As discussed supra, the water for which the Applicants have applied is waste and seepage water which is not used by prior appropriators. The Applicants' use of it does not constitute an additional consumption of water beyond the naturally-occurring losses.

Additionally, the Applicants cannot compel the Pryde Ditch water users to continue the practices which provide the waste and seepage water. The Pryde Ditch Company is entitled to improve the efficiency of the Pryde Ditch or otherwise alter or eliminate the flow which is irrigating the Applicants' trees. See Finding of Fact 10; Newton v. Weiler, 87 Mont. 164, 286 P. 133 (1930); Popham v. Halloran, 84 Mont. 442, 275 P. 1099 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927).

6. The record in this matter indicates that there are no other planned uses or developments for which a permit has been issued or for which water has been reserved, with which the proposed use would unreasonably interfere.

7. It would appear from the record in this matter that the Applicants' proposed use of water, the irrigation of trees for a firewood supply, is a beneficial use of water. See MCA § 85-2-102(2)(a), Finding of Fact 7. However, it is not necessary to decide this issue, since the present matter has been decided on other grounds. See discussion below.

8. The proposed means of diversion, construction, and operation of the appropriation works are not adequate.

Obviously subirrigation is "adequate" from the Applicants' point of view, since it achieves the desired effect of irrigating their trees. Beyond that, it is a very convenient irrigation method for the Applicants, since they are not required to install, operate, or maintain a diversion or an irrigation system. However, a determination of the adequacy of the proposed means of diversion, construction, and operation must be made not only on the basis of whether such means are adequate to achieve the Applicants' proposed appropriation, but also on the basis of whether the proposed means are reasonable and adequate to prevent undue waste of water. See MCA § 85-2-101, 85-2-102(13), and 85-2-114 (1985).

Apart from the issue of whether a private individual (as opposed to a public agency) can be said to have "appropriation works" when water has not been diverted, impounded, or withdrawn (see MCA § 85-2-102(1)), it is well-settled by case law that every appropriator has a duty to establish a reasonable means of diverting water. See State ex rel. Crowley v. District Court, 108 Mont. 89 88 P.2d 23 (1939).

As the Department has previously held,

"Reasonableness" must be weighed not only by the customary character of the diversion practice . . . but also by the effect of such practices on water availability for others. There is no question that subirrigation may be a convenient way to divert water underneath the ground, but convenience is not the test. . . . (T)he practice of subirrigation requires that an extensive body of water be left untouched merely so that a small fraction thereof can be actually used. This factor points strongly to the unreasonable character of the diversion scheme. (Citations omitted.)

In the Matter of the Application for Change of Appropriation Water Right Nos. 36294-c41A through 36301-c41A by Beaverhead Partnership, Proposal for Decision, February 11, 1985; page 83.

In the present matter, the Applicants wish to preserve the entire flow of water past their property against any future appropriators so that the cottonwood trees on their property will continue to be subirrigated. (See Finding of Fact 9.) Even though the Applicant testified that he would be willing to accept half the flow rate for which he has applied, there is no evidence to suggest that the resulting flow rate would not be highly disproportionate to the amount of water which actually may be needed for the irrigation. (See Finding of Fact 17.)

It is clear that the Applicants need a comparatively large amount of water in the stream in order that adequate irrigation may occur (see Finding of Fact 7), and wish to ensure that the water is available by forestalling any future uses "upstream." (See Finding of Fact 8.) As discussed in Beaverhead, supra, "this factor points strongly to the unreasonable character" of the means of diversion and operation.

9. Even assuming arguendo that substantial credible evidence could be found that all of the criteria for issuance of a permit had been met in this matter, granting the Applicants a permit would not give them the security against future appropriations which is their declared purpose in applying for a permit, since they do not have a right to demand continued use of the water for subirrigation purposes.

The Montana Water Court, in the present adjudication, has held that subirrigation is not a protectible means of diversion. The Department also has previously held that an appropriator cannot assert a subirrigation use of water to defeat subsequent permit applications. See Beaverhead, supra; In the Matter of the Application for Beneficial Water Use Permit Nos. 18845-s76LJ and 18846-s76LJ by Everett G. and Anna C. Orem, August 8, 1984 Proposal for Decision; In the Matter of the Application for Beneficial Water Use Permit N. 39887-s76D by West Kootenai Water Users Association, February 13, 1986 Proposal for Decision.

The question of whether a subirrigator will be allowed to somehow translate a subirrigation "right" into some type of surface diversion right has not been resolved.¹ However, as the

¹ The Water Court has been granting subirrigators volumes of water in the preliminary decrees while declaring the means of diversion not protectible, but have not assigned such uses any flow rates. In view of the recent Supreme Court decision which suggests that flow rate, rather than volume, is to be the deciding factor in determining the extent of a water right, it is difficult to know whether a subirrigator has any quantifiable water use right which could be utilized by changing to a surface means of diversion. See McDonald v. State of Montana, ___ Mont. ___ P.2d ___, 43 State Rep. 576 (1986).

present matter now stands, the Applicants have applied to use a means of diversion which is not protectible.

10. The Applicants are entitled to apply for a beneficial water use permit for irrigation, utilizing a surface means of diversion such as a pump, spreader dike, or ditch system. In such an event, the Department would have to re-evaluate the Applicants' proposed project in light of possible adverse effect to senior appropriators (resulting from potential additional consumptive use of the waters), and the other permit criteria specified in MCA § 85-2-311.

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 56173-s43D by S. Kenneth and Ann V. Shesne hereby is denied.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. MCA § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

Parties who request oral argument are not entitled to present evidence that was not presented at the original contested case hearing: no party may give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the information which already is present in the record.

DONE this 20th day of October, 1986.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

CASE # 56173

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Sally Martinez, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on October 20, 1986, she deposited in the United States mail, first class postage prepaid, a Proposal for Decision, an order by the Department on the Application by S. Kenneth and Ann V. Shesne, Application No. 56173-s43D, an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. S. Kenneth & Ann V. Shesne, Rt 2, Box 3455, Red Lodge, MT 59086
2. Rocky Fork Decreed Users, Inc., c/o Gladys Zumbrun, Secretary, Rt. 2, Box 3260, Red Lodge, MT 59068
3. Haara Ditch Co., c/o Lloyd Zumbrun, Rt 2, Box 3260, Red Lodge, MT 59068
4. Pryde Ditch Co., c/o Edwin L. Draper, Rt. 2, Box 3040, Red Lodge, MT 59068
5. Keith Kerbel, Manager, Water Rights Bureau Field Office, Billings, MT (inter-departmental mail)
6. Gary Fritz, Administrator, Water Resources Division (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Sally Martinez

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 20th day of October, 1986, before me, a Notary Public in and for said state, personally appeared Sally Martinez, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

T. L. Reynolds
Notary Public for the State of Montana
Residing at _____, Montana
My Commission expires _____

CASE # 56173